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August 2, 1999

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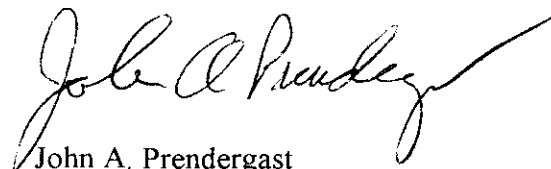
Re: Private Radio Auction Proposal
WT Docket No. 99-87 and RM-9332

Dear Ms. Salas:

On behalf of our private internal radio clients, and pursuant to Section 1.415(a) of the Commission's Rules, we are filing the original and six copies of comments in the above-referenced rule making proceeding.

If you have any questions regarding this matter, please do not hesitate to contact this office.

Respectfully submitted,



John A. Prendergast
Laura A. Otis

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Sections 309(j) and)	WT Docket No. 99-87
337 of the Communications Act of 1934)	
as Amended)	
)	
Promotion of Spectrum Efficient)	RM-9332
Technologies on Certain Part 90)	
Frequencies)	
)	
Establishment of Public Service Radio)	
Pool in the Private Mobile)	
Frequencies Below 800 MHz)	

TO: The Commission

COMMENTS OF
BLOOSTON, MORDKOFKY, JACKSON & DICKENS

John A. Prendergast
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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SUMMARY

The Commission's proposal to adopt auctions and wide-area licensing for shared private radio spectrum is inconsistent with the Commission's auction authority, unworkable, and adverse to the public interest. The Private Radio Licensees therefore urge the Commission to retain its well-reasoned, efficient site-based licensing methodology, and to confirm its finding in other contexts that auctions are not appropriate for licensing shared spectrum. This recommended action would be consistent with the Commission's statutory obligations to act in the public interest.

As a preliminary matter, the Commission has not adequately described an auction methodology which could be used for the heavily encumbered private radio. Pursuant to the notice requirements of the Administrative Procedure Act, the Commission should treat its *Notice of Proposed Rulemaking* ("NPRM") as a Notice of Inquiry, since this proceeding would be more appropriate as a way to explore the feasibility and benefits of auctions in the private radio services. Further rulemaking will be needed before final rules are adopted.

The Balanced Budget Act of 1997 did not alter or eliminate fundamental restrictions on the Commission's auction authority which dictate that the Commission preserve the existing shared-use licensing scheme. Under the auction statute, the Commission is not authorized to convert the private, shared frequencies to exclusive use, nor to adopt a wide-area licensing scheme when the special characteristics and operational needs of the private radio community compel the use of site-by-site licensing method.

The statute also restricts the Commission's authority to auction the private spectrum by requiring that a particular licensing scheme promote Congress' public interest objectives.

The adoption of auctions in the private radio services will not promote Congress' public interest objectives. The proposed auction will result in the dramatic loss of spectrum for private internal use, which will adversely affect the private radio community, consumers, and the public in general. The adoption of auctions will also lead to the inefficient use of the electromagnetic spectrum, and create rather than eliminate administrative expense and delays for licensees. The Commission cannot justify its auction proposal based on the potential recovery of the value of spectrum. The auction statute explicitly states that the Commission may consider recovery of spectrum value only when the spectrum in question is used for commercial purposes, which does not apply in the case of private internal radio operations.

The Commission does not have statutory authority to auction the private spectrum, nor would auctions serve the public interest. Moreover, the costs of holding auctions would outweigh the practical benefits. In order to preserve the important role served by private radio spectrum, the Commission would have to conduct auctions for the private radio services on a frequency-by-frequency, site-by-site basis. Each license area would have to be small, to reflect the minimal coverage requirements of many private radio users. The costs of holding frequent auctions for small licenses would not be a practical use of the Commission's scarce resources.

To ensure the survival of the private radio industry, the Commission should abandon its proposed auction scheme and retain its well-reasoned, site-based licensing method which promotes Congress' public interest objectives.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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TO: The Commission

COMMENTS OF BLOOSTON, MORDKOFKY, JACKSON & DICKENS

The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its private internal radio clients listed in Attachment A hereto (the "Private Radio Licensees"), and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits its comments in the above-captioned proceeding.

I. Statement of Interest

The Private Radio Licensees include companies as large as Minnesota Mining and Manufacturing Co. ("3M"), which efficiently uses private radio operations carefully tailored to cover its manufacturing facilities; and many smaller companies that depend on private radio for internal communications necessary to carry on their business. Nine of the Private Radio Licensees are rural telephone or electric companies, which use their radios to ensure the proper installation, functioning, and maintenance of vital

communications and power services in rural America; the Wilkinsburg-Penn Joint Water Authority uses its radios to ensure the proper functioning of public water systems, and to protect the public from emergencies related to these water operations; and others use the radios for such purposes as providing alarm services, coordinating road paving operations (and preventing automobile accidents around the paving site), and dispatch of taxicabs.

II. Introduction

In its *Notice of Proposed Rulemaking* (“*NPRM*”), released in the above-captioned proceeding on March 25, 1999, the Commission has requested comments on the issue of whether competitive bidding (i.e., auctions) and wide-area licensing, pursuant to Section 309(j) of the Communications Act of 1934 (the “Communications Act” or “Act”),¹ should be applied to private internal radio services, and whether there are means by which the Commission can design a competitive bidding system to ensure that the four public interest objectives described in Sections 309(j)(3) are satisfied. As demonstrated below, the introduction of an auction scheme to replace the Commission’s well-reasoned site-based licensing methodology would be imprudent, impracticable and adverse to the public interest. The Commission should therefore confirm its finding in other contexts² that auctions are not appropriate for licensing shared spectrum, pursuant to its statutory obligations to act in the public interest.

III. The Commission Should Treat the *NPRM* as a Notice of Inquiry

¹ 47 U.S.C. § 309(j) (as amended by the Balanced Budget Act of 1997, § 3002).

² Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2756, para. 40 (1997).

It must first be noted that, before auction rules are adopted, the Commission must give interested parties sufficient opportunity to offer meaningful comments on the specific auction rule proposal, as required by Section 4(b) of the Administrative Procedure Act (“APA”).³ Section 4(b) requires that a rulemaking proceeding be preceded by published notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁴ Notice need not contain every precise proposal which the Commission may ultimately adopt; however, the description of the “subjects and issues involved” must afford interested parties “a reasonable opportunity to participate in a rulemaking process.”⁵ As one court pointed out, notice must not only provide adequate time for the submission of comments, but must also “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”⁶ As shown below, the *NPRM* falls short of this requirement, if the Commission intends to adopt specific rules based on the *NPRM*’s comment cycle. As could be expected, the Commission’s proposal at this stage is exploratory in nature, examining such a wide range of issues and potentially conflicting courses of action that commenters can only provide input on possible directions for the Commission’s auction inquiry. The *NPRM* provides neither specific rule wording nor the kind of focused analysis that would allow the adoption of final rules following the instant comment cycle. Blooston, Mordkofsky, Jackson & Dickens therefore wishes to clarify that a further

³ Administrative Procedure Act § 4(b), 5 U.S.C. § 553(b).

⁴ Administrative Procedure Act § 4(b), 5 U.S.C. § 553(b)(3).

⁵ *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 650 F.2d 1235, 1248 (D.C. Cir. 1980).

⁶ *Florida Power & Light Co. v. United States*, 846 F.2d 765, 777 (D.C. Cir. 1988).

NPRM would be issued prior to the adoption of actual rules, if the Commission decides to pursue an auction proposal.

In the *NPRM*, the Commission invited comment on a number of issues, including the issue of whether it has the authority to hold auctions in the private radio services, and whether the adoption of an auction scheme will further the public interest objectives set forth in Section 309(j)(3) of the Communications Act. The Commission, however, did not adequately describe an auction methodology which could be used for the heavily encumbered private radio industry, with over 1,000,000 licensed stations sharing the private radio frequencies.⁷ The *NPRM* leaves interested parties with only a vague idea of how the Commission will treat these incumbents if it decides to implement competitive bidding in the private radio services. The Commission indicated that “incumbents would be able to continue existing operations without harmful interference” but has not explained how such protection could be achieved. Because the *NPRM* does not provide a sufficiently detailed description of its proposed licensing scheme, and the auction proposal is only a preliminary one that is fraught with novel issues, the Commission should treat the *NPRM* as a Notice of Inquiry, as a means to explore the feasibility and benefits of auctions in the private radio services.

IV. The Balanced Budget Act Does Not Create Authority for Auctions in the Private Internal Radio Services

In the 1993 Omnibus Budget Act (“1993 Budget Act”),⁸ Congress added Section 309(j) to the Communications Act of 1934, authorizing the Commission to license spectrum through the use of competitive bidding. Under the 1993 Budget Act, the

⁷ Wireless Telecommunications Bureau, *Private Land Mobile Radio Services: Background*, Introduction (p. 1) (December 18, 1996 (“*White Paper*”).

Commission could only use competitive bidding to resolve mutually exclusive applications that involved the commercial use of spectrum. In 1997, Congress revised Section 309(j) to require the Commission to use competitive bidding to resolve mutually exclusive applications for initial licenses in most services, if such action would promote the public interest.⁹ As discussed below, Congress' 1997 revisions to the auction statute did not alter or eliminate fundamental restrictions on the Commission's auction authority which dictate that the Commission preserve the existing shared-use licensing scheme.

A. The Commission Has an Obligation to Avoid Mutual Exclusivity

The Commission's auction authority is restricted by Section 309(j)(6)(E) of the Act, which states that nothing in the statute should "be construed to relieve the Commission of the obligation in the public interest to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."¹⁰ The Private Radio Licensees are concerned that the Commission, in its implementation of Section 309(j), will ignore this provision of law and artificially create mutual exclusivity when it does not normally exist in the shared, private radio bands.

In response to the question posed in paragraphs 60-61 of the *NPRM*, Congress did intend a greater emphasis on avoiding mutual exclusivity, when adopting the Balanced Budget Act. In a letter to Chairman William Kennard, dated December 28, 1998, several United States Representatives and Senators urged the Commission to honor its

⁸ Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993).

⁹ 47 U.S.C. § 309(j)(1), (2), (3) (as amended by the Balanced Budget Act of 1997, § 3002).

¹⁰ 47 U.S.C. § 309(j)(6)(E).

obligations under Section 309(j)(6)(E), stressing the fact that Congress, when amending Section 309(j), included express language to ensure that the Commission did not overlook its obligation to avoid mutual exclusivity.¹¹ As noted in their letter, Section 3002 of the Balanced Budget Act of 1997 amended the Commission's auction authority to read as follows:

*If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.*¹²

By including a reference to Section 309(j)(6)(E) in its amendment, Congress clearly intended to prevent the Commission from licensing shared spectrum by competitive bidding. This intent is manifest in the Conference Report to the Balanced Budget Act of 1997, which states that:

Notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking the engineering solutions, negotiations, or other tools that avoid mutual exclusivity.¹³

¹¹ Letter to Chairman William E. Kennard from Rep. John D. Dingell, Rep. W. J. Tauzin, Sen. Tom Daschle, Sen. John B. Breaux, Sen. Spencer Abraham, and Sen. Slade Gorton (December 22, 1998) ("Letter to Kennard").

¹² Pub. L. No. 105-33, § 3002 (1997) (emphasis added).

¹³ H.R. Conf. Rep. No. 105-217, 105th Cong. 1st Sess., at 572 (1997).

Based on this language, it is clear that the Commission lacks the statutory authority to adopt its wide-area licensing proposal, because this action would flout the purpose and intent of Section 309(j)(6)(E) of the Act by artificially creating mutual exclusivity rather than avoiding it. The express language of Section 309(j), and its legislative history, unequivocally establish that the Commission is obligated to preserve the shared use licensing methodology in the private internal radio services. The Commission should recognize this mandate and understand that it “must not ignore what Congress enacted by reading this provision out of the law and adopting policies inconsistent with its statutory requirements.”¹⁴

The Commission has acknowledged its obligations under Section 309(j)(6)(E), but has indicated that public interest considerations may compel the adoption of a wide-area licensing scheme.¹⁵ The Commission has asked for comment on whether Congress, in emphasizing the obligation to avoid mutual exclusivity, intended that the Commission “give greater weight to that obligation and less to other public interest objectives.”¹⁶ As discussed below, there is no need for the Commission to balance its obligation to avoid mutual exclusivity with its obligation to promote public interest objectives, because the public interest, in this case, is best served by the preservation of the shared environment. At present, there are more than 1,000,000 licensed stations authorized to operate more than 12 million private radios, representing an investment of over \$25 billion.¹⁷ These

¹⁴ Letter to Kennard, at 2.

¹⁵ See *NPRM*, at paras 60-61.

¹⁶ *NPRM*, at para. 60.

¹⁷ *White Paper*, at 1.

highly efficient private radio systems are carefully tailored to satisfy the unique operational needs of the private radio industry. The adoption of wide-area licensing and competitive bidding in the private radio services would unfairly cause economic harm to hundreds of thousands of private radio users who have invested in technology pursuant to the Commission's existing rules, and lead to an upheaval of operating rights and interests. This disruption in the private radio marketplace therefore cannot be justified on public interest grounds.

Private radio systems are generally designed to serve specific factories, railways, campuses, etc.. While the goal of commercial service providers (such as cellular, personal communications service ("PCS"), and paging carriers) is to offer the widest possible coverage, the vast majority of private radio licensees seek to tailor their operations to specific, geographically confined needs. This fact allows the licensing of multiple users in the same general area, thus promoting efficient use of the spectrum through careful engineering. This efficient use approach would be destroyed if the Commission were to impose a wide-area licensing scheme on Part 90 spectrum, for the sake of promoting the "bigger is better" paradigm that is appropriate only to commercial operations. Such action would ignore the Congressional mandate to use "engineering solutions" to avoid mutual exclusivity.

Similarly, the Commission cannot legitimately introduce wide-area licensing and competitive bidding in the private radio services on the ground that the existing private radio rules and licensing methodology are "outmoded."¹⁸ In *DIRECTV v. FCC*, the court

¹⁸ *NPRM*, at para. 60, footnote 173 (quoting *DIRECTV v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997)).

noted that Section 309(j)(6)(E) does not require the Commission “to adhere to a policy it deems outmoded ‘in order to avoid mutual exclusivity...in licensing proceedings’; rather, that provision instructs the agency, in order to avoid mutual exclusivity, to take certain steps, such as the use of an engineering solution, within the framework of existing policies.”¹⁹ The court had reached this conclusion after reviewing an *NPRM* which demonstrated that the Commission’s existing method of distributing Direct Broadcasting Satellite (“DBS”) channels was outmoded in light of technological advances and changed circumstances in the DBS marketplace. In the case at hand, however, the Commission has offered no evidence to demonstrate that the circumstances in the private radio industry compel the use of auctions, or that the shared use licensing method is outmoded or in any way inappropriate. To the contrary, the recently revised private radio rules reflect the Commission’s sound reasoning, careful analysis, and full consideration of numerous comments and petitions submitted in PR Docket 92-235 (the “*Refarming*” proceeding). In this rulemaking proceeding, after considerable analysis, the Commission implemented rule changes which, according to the Commission, “provides the private land mobile radio (PLMR) community with a regulatory framework that promotes efficient use of spectrum, increases technical flexibility, enhances the deployment of new technologies, and promotes the competitive and robust marketplace for product development.”²⁰ Considering the Commission’s recent decision in the *Refarming*

¹⁹ *DIRECTV v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997).

²⁰ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-235, PR Docket No. 92-257, *Memorandum Opinion and Order*, 11 FCC Rcd 17676 (1996).

proceeding, and its own statements confirming the public interest benefits of a shared use environment, the Commission cannot reasonably avoid its obligations under Section 309(j)(6)(E) on the basis that auctions and wide-area licensing are necessary to correct an outmoded policy. The current system of frequency coordination and first-come, first-served filing is fast, efficient and rarely results in mutual exclusivity.

Aside from the Commission's lack of authority to artificially create mutual exclusivity, it is impracticable to do so. Any geographic area licensee that obtains a license on shared spectrum will not have the luxury of implementing exclusive service at will. Rather, the geographic area licensee will be required to protect incumbent co-channel and adjacent channel licensees in its area, or will be subject to interference from those licensees. In response to paragraph 67 of the *NPRM*, mixing exclusive and shared licensees cannot be achieved without causing severe disruption in the private radio marketplace, and without imposing considerable costs on the industry and the public.

B. The Commission Must Consider the Unique Characteristics of Private Radio Services

The Commission has an obligation under the auction statute to consider the special characteristics and operational needs of the private radio industry when pursuing its proposal to employ wide area licensing in the private radio services. Under Section 309(j)(4)(C) of the Act, the Commission must consider “the public interest, convenience, and necessity, the purposes of this Act, and *the character of the proposed service*” when designing competitive bidding systems.²¹ Following this mandate, the Commission would readily see that the assignment of private radio frequencies through wide-area

²¹ See 47 U.S.C. § 309(j)(4)(C) (emphasis added).

licensing would not encourage the efficient use of spectrum. As the Land Mobile Communications Council (“LMCC”) explained in a Petition for Rulemaking submitted to the Commission on April 22, 1998, “[e]ven the most superficial analysis of the ‘character’ of PMRS ‘service’ reveals that wide-area geographic license “designations” are an inappropriate method for the assignment of PMRS wireless licenses. Because PMRS systems are inherently designed for the service of small or distinct geographic areas (typically, less than 1,000 squares and often fractions of a square mile, in the case of low power operations), the wide-area model applied for CMRS systems is inapplicable.”²² Considering the unique characteristics of private radio systems, the allocation of site-based licenses is clearly the most appropriate method of licensing the private radio spectrum.

The Commission is nonetheless considering the use of wide-area licensing for private radio spectrum on the basis that it would promote the public interest by providing “greater buildout flexibility.”²³ This rationale, however, is wholly inapplicable to the private internal radio services. Private internal radio licensees do not need “greater buildout flexibility” because they are not in the business of providing commercial radio services to subscribers. Since private radio users do not generally require wide coverage, the Commission should abandon its wide-area licensing proposal and retain the efficient, site-by-site licensing method. The only problem with current licensing is that, in major metropolitan areas, more spectrum is needed. The auction scheme will not create new

²² Petition for Rulemaking submitted by the Land Mobile Communications Council, *In the Matter of An Allocation of Spectrum for the Private Mobile Services*, RM -, 6 (April 22, 1998) (LMCC Petition).

²³ *NPRM*, at para. 63.

spectrum. The fix for this problem is to allocate new frequency bands for private use, as recently proposed by the LMCC.

V. The Adoption of Auctions for the Private Radio Spectrum Will Not Promote Congress' Public Interest Objectives

The Commission can conduct auctions only if the use of this licensing method would promote the following public interest objectives:

- i. the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- ii. promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- iii. recovery for the public of a portion of the value of public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- iv. efficient and intensive use of the electromagnetic spectrum.²⁴

As discussed below, the implementation of auctions in the private radio services would not promote these objectives.

A. The Proposed Auction Will Result in the Loss of Spectrum for Private Internal Use

If the Commission were to implement auctions for the sake of wide-area licensing and/or implement a "band manager" scheme in the private radio services, it would be nothing less than an effort to re-allocate the private spectrum for commercial use. The Balanced Budget Act did not authorize such reallocation. Moreover, the Commission's

²⁴ 47 U.S.C. § 309(j)(3)(A)-(D)

proposal disturbingly fails to take into account the fact that a significant number of private radio users are small and medium-sized businesses which lack the financial resources necessary to participate in auctions and build out wide-area systems. The adoption of the auctions for the private radio spectrum will make it difficult, if not impossible, for many traditional private users to obtain licenses, resulting in a grand-scale plundering of the private radio spectrum by commercial wireless service providers that will be unable or unwilling to provide, at a reasonable cost, the customized services which hundreds of thousands of businesses need to effectively compete in the global marketplace, and to ensure public safety. Clearly, by creating administrative obstacles for small and medium-sized businesses with considerable budgetary constraints, the Commission's auction proposal frustrates the important objective of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses."²⁵ Indeed, the Commission's "band manager" proposal would lead even more directly to "an excessive concentration of licenses."²⁶

As the Commission is well aware, a wide variety of businesses, both large and small, rely on private radio systems to support their day-to-day operations, and to ensure the safety of personnel, consumers and the general public. Businesses use private radio systems for dispatch purposes, and to effectively control, monitor and coordinate the activities of workers and machines. Private radio is also used as a vital communications

²⁵ 47 U.S.C. § 309(j)(3)(B).

²⁶ Id. Similarly, the possible use of "combinatorial bidding" (*NPRM* at para. 78) would only facilitate the concentration of licenses into the hands of a few large bidders.

tool during emergencies and inherently dangerous situations. Manufacturers handling hazardous materials, for example, use private radio systems extensively to monitor the safety of workers and for emergency response communications. Other businesses rely on private radio as an emergency backup during natural disasters or other large-scale emergencies, when commercial telephone networks are damaged, or too congested, to enable effective emergency relief communications. If the Commission pursues its proposal and allows further commercial infringement of the private radio spectrum, businesses throughout the United States will be forced to operate less efficiently, and will be less capable of developing and deploying “new technologies, products, or services for the benefit of the public”²⁷ Moreover, without effective use of private radio systems, they will be less capable of protecting the safety of workers, consumers, and the public in general.

The Commission’s Wireless Telecommunications Bureau (“WTB”) has acknowledged the value of private internal radio services to the nation’s economy, observing that private radio applications “give companies a direct and immediate control over their operation; a critical factor in maintaining efficient performance, preventing accidents, and responding to emergencies.”²⁸ The WTB has also recognized that “[p]rivate radio systems service a great variety communication needs that common carriers and other commercial service providers historically have not been able or willing to fulfill.”²⁹ There are already numerous commercial radio service providers recently

²⁷ 47 U.S.C. § 309(j)(3)(A).

²⁸ *White Paper* at 8.

²⁹ *Id.* at p. 7.

licensed in the cellular, PCS and SMR bands. Businesses who can benefit from the wide area coverage and telephone-like service provided by these carriers can avail themselves of such services, and there is thus no need to turn private radio spectrum into commercial spectrum. Instead, many businesses need private spectrum, to tailor their coverage and capabilities to their particular needs.

To ensure the survival of the private radio industry, it is imperative that the Commission retain its current licensing scheme.

B. Implementing Auctions For Shared Channels Will Lead to the Inefficient Use of the Electromagnetic Spectrum

As discussed previously, the special characteristics and operational needs of the private radio community mandate the use of a site-by-site licensing method. Private radio systems are inherently designed for the service of small or distinct geographic areas. To require that private radio users build out systems for a geographic area which exceeds their operational needs is imprudent, and will lead to the inefficient use of spectrum. It is also imprudent to convert the shared private radio channels to exclusive licensing, when the shared licensing system is a far more spectrally efficient system. The existing shared use licensing procedure, which “allows multiple users with different coverage areas and capacity requirements to use the same frequencies effectively”³⁰ promotes the “efficient and intensive use of the electromagnetic spectrum”³¹ and should not be abandoned in favor of an auction program which will not easily accommodate a wide variety of applicants and incumbents with different coverage and operational requirements.

³⁰ *NPRM*, at para. 14.

³¹ 47 U.S.C. § 309(j)(3)(D).

C. The Adoption of Auctions for Shared Spectrum Would Create Administrative Expense and Delays for Licensees

The implementation of the proposal to auction shared spectrum will require the Commission to devote substantial administrative resources to minimize the disruption in the private radio marketplace, and will impose unnecessary costs on private radio users. As mentioned, the private radio bands are heavily congested by existing users, each with rights and interests that must be honored. To ensure that the auction winner does not infringe upon these rights and interests, the Commission must take steps to protect the incumbents from interference. This protection cannot be achieved without administrative delay or expense. An auction scheme would therefore frustrate rather than promote the public interest objective of promoting the “development and rapid deployment of new technologies, products, and services....*without administrative or judicial delays*”³² The Commission should retain the existing licensing scheme, which presents no significant administrative burdens and which allows private radio applicants to begin operating (under conditional temporary authority) soon after they have filed a license application with the Commission.

D. The Commission May Not Use Auctions to Create Revenues for the Federal Treasury or to Recover the Value of Private Spectrum

The Commission must recognize that implementing exclusivity for the purpose of creating mutual exclusivity in order to justify auctions is contrary to the authority granted to the Commission in Section 309(j)(7)(A) of the Act. Under this portion of the auction statute, “the Commission may not base a finding of public interest, convenience, and

³² 47 U.S.C. 309(j)(3)(A) (emphasis added).

necessity on the expectation of Federal revenues from the use of a system of competitive bidding...”³³ Although the Commission has not openly indicated its desire to create revenues for the Federal treasury through private radio auctions, the recovery of the value of spectrum has in the past been one of the justifications for applying auctions to various radio services pursuant to Section 309(j)(3)(C) of the Act.³⁴ However, Section 309(j)(3)(C) allows the Commission to consider recovery of spectrum value only when the spectrum in question is used for *commercial purposes*, which does not apply in the case of private internal radio operations.

VI. Auction Design

As discussed above, the Commission does not have statutory authority to auction the private spectrum, nor would auctions serve the public interest. Moreover, the costs of holding auctions would outweigh the practical benefits. In order to preserve the important role served by private radio spectrum, the Commission would have to conduct auctions for the private radio services on a frequency-by-frequency, site-by-site basis. Each license area would have to be small, to reflect the minimal coverage requirements

³³ 47 U.S.C. §309(j)(7)(A).

³⁴ See, e.g., Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR Docket 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 1999 FCC LEXIS 2311, para. 32 (rel. May 24, 1999); Auction of 800 MHz SMR Upper 10 MHz Band; Minimum Opening Bids or Reserve Prices, DA 97-2147, *Order*, 12 FCC Rcd 16354, para 11 (rel. October 6, 1997); Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, GEN Docket No. 90-264, *Memorandum Opinion and Order*, 1999 FCC LEXIS 1741, para. 51 (rel. April 20, 1999).

of many private radio users. The costs of holding frequent auctions for small licenses would not be a practical use of the Commission's scarce resources.³⁵

³⁵ Paragraph 86 of the *NPRM* asks whether commercial mobile radio service ("CMRS") providers should be eligible to bid on private radio spectrum. As discussed above, auctions are not appropriate for private radio licensing. Moreover, CMRS providers should not be allowed to use private mobile spectrum for CMRS purposes, by auction or by any other licensing scheme. CMRS has been the subject of numerous new spectrum allocations, and numerous Part 90 private radio dispatch and paging have already

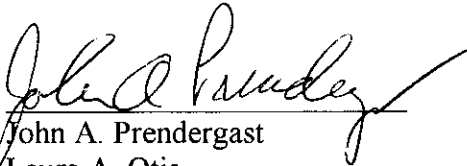
VII. Conclusion

As described above, the Commission's proposal to implement competitive bidding and wide-area licensing for shared private radio spectrum is inconsistent with the Commission's auction authority, unworkable, and adverse to the public interest. To ensure the survival of the private radio industry, the Commission should abandon its proposed auction scheme and retain its well-reasoned, site-based licensing process which promotes Congress' public interest objectives.

Respectfully submitted,

The Private Radio Licensees

By:


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been reclassified as CMRS. The remaining sliver of Part 90 spectrum is needed for internal radio operations which are so vital to the Nation's economy.

Attachment A

The Private Radio Licensees:

Automobile Club of Southern California
Betterroads Asphalt Corporation
Clarkson Construction Company, Inc.
Cross Timbers Oil Company
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Minnesota Mining and Manufacturing Co.
Mobilephone of Humboldt, Inc.
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Pond Branch Telephone Company, Inc.
Supreme Security Systems
TXU Communications Telephone Company
Webster Calhoun Cooperative Telephone Association
The Wilkinsburg-Penn Joint Water Authority
XIT Rural Telephone Cooperative, Inc.
Zirkelbach Refrigeration, Inc.

CERTIFICATE OF SERVICE

I, Laura A. Otis, an attorney at the law office of Blooston, Mordkofsky, Jackson & Dickens, hereby certify that on this 2nd day of August, 1999, I caused to be hand-delivered a copy of the foregoing Comments to the following:

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Commissioner Gloria Tristani
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Commissioner Harold Furchgott-Roth
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